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No. 687 and 688

In the Supreme Court of the United States

[redacted] Term, 1967

[redacted] KWAN CHING, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

CHING F. S. KWOK, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [redacted] CIRCUIT

[redacted] OF THE GOVERNMENT

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 637

CHAN KWAN CHUNG, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

No. 638

CHENG FAN KWOK, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

1. Petitioners are natives and citizens of China who entered the United States as crewmen, remained longer than permitted and were ordered deported. Each sought from the District Director of the Immigration and Naturalization Service (in Newark, N.J.) a stay of deportation so that he could (by differing routes) apply for relief as a refugee under Section 203(a)(7) of the Immigration and Nationality Act. Petitioner in No. 637 sought the stay in order to submit an application for adjustment of status pursuant

to Section 203(a)(7). The stay was denied on the ground that adjustment of status under this section is governed by Section 245 (8 U.S.C. 1255), which specifically excludes alien crewmen. Petitioner in No. 638 sought a stay so that he could file an application under Section 203(a)(7), stating that he would depart from this country as soon as his classification was determined.[1] His application was denied on the ground that he was not eligible for the relief sought. See *Tai Mui* v. *Esperdy*, 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017, where denials of relief to aliens in situations similar to those of the instant petitioners were upheld. See also *Wing Wa Lee* v. *Immigration & Naturalization Service*, 375 F. 2d 723 (C.A. 9), certiorari denied, October 9, 1967, No. 281, this Term.

Each petitioner then brought in the Court of Appeals for the Third Circuit a proceeding under Section 106(a) of the Act (8 U.S.C. 1105a(a)) seeking review of the order of the district director denying the stay of deportation which he had sought.[2] Both

[1] Petitioner in No. 638 lacked the two years of residence required to make application for adjustment of status in this country under Section 203(a)(7).

[2] The court of appeals granted motions submitted in behalf of these and other aliens that the decision in *Chan Kwan Chung* (No. 637) would be binding as to the cases of some 21 other alien crewmen based upon substantially the same facts, and that the decision in *Cheng Fan Kwok* (No. 638) would be binding as to some 20 other alien crewmen. In addition, in this circuit there are close to 100 petitions involving the same issue either pending or which have been dismissed (with stays of mandate entered pending this Court's determination of the instant certiorari petitions).

petitioners and the government took the position that the court of appeals had jurisdiction under Section 106(a) since the relief sought from the district director would affect the execution of the final orders of deportation which had been entered against petitioners. That court, however, adopted the view of the Second Circuit in *Tai Muï* v. *Esperdy, supra,* that review under Section 106(a) in a court of appeals lies only where the order sought to be reviewed was made by the special inquiry officer as an integral part of deportation proceedings subsequently appealed to the Board of Immigration Appeals. It therefore dismissed the petitions for review without consideration of the merits.

2. The government adheres to the view that review was properly sought in the court of appeals since the relief sought by petitioners before the Immigration and Naturalization Service would have delayed execution of final orders of deportation.

In *Foti* v. *Immigration and Naturalization Service,* 375 U.S. 217, this Court held that refusal of the Attorney General to grant suspension of deportation was reviewable in the court of appeals under Section 106(a). While that holding was confined to the narrow question presented, the Court broadly construed the legislative history of the statute as evidencing the plain objective of Congress to eliminate bifurcated judicial review, which frustrates and delays the deportation process, by giving courts of appeals exclusive jurisdiction to review denials of discretionary relief in proceedings before special inquiry officers

(375 U.S. at 224–226, 232).[3] Subsequently, in *Giova* v. *Rosenberg*, 379 U.S. 18, this Court held that orders refusing to reopen deportation proceedings (a determination not made during the proceeding determining deportability) were also reviewable in the courts of appeals.[4]

Thus, the holding in *Giova* and the rationale discussed in *Foti* seem to support the view that, at least where there is a final order of deportation, the denial by the Service of any application to vacate, suspend, or delay execution of such order is reviewable in the appropriate court of appeals under Section 106(a). That is the view of the Seventh,[5] Sixth[6] and

[3] In the *Foti* opinion, the Court stated that denials of other forms of discretionary relief, such as voluntary departure and withholding of deportation, were reviewable by the courts of appeals as well, but noted that they involved "determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals" (375 U.S. at 229).

[4] It should be noted, however, that the motion to reopen involved in *Giova* had been considered and denied by the Board of Immigration Appeals incident to its review of the deportation order, and not by a district director. This was pointed out by the Second Circuit in *Tai Mui* v. *Esperdy*, 371 F. 2d at 776, in distinguishing *Giova* from the situation there involved, with respect to the applicability of Section 106(a).

[5] The Seventh Circuit holds that courts of appeals have exclusive jurisdiction over any administrative action which is "ancillary to" a deportation order. *Skiftos* v. *Immigration and Naturalization Service*, 332 F. 2d 203 (C.A. 7); *Melone* v. *Immigration and Naturalization Service*, 355 F. 2d 533 (C.A. 7); *Roumeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453 (C.A. 7), certiorari denied, 371 U.S. 921. Cf. *Martin* v. *Gardner*, 378 F. 2d 352 (C.A. 7).

[6] See *Talavera* v. *Pederson*, 334 F. 2d 52 (C.A. 6), taking jurisdiction where a special inquiry officer had denied to an

Fourth[7] Circuits. A more restrictive view—that only matters determined by a special inquiry officer and subject to review by the Board of Immigration Appeals are within the purview of the statute—has been taken by the Second and Ninth Circuits.[8] That, of course, is also the view adopted by the court below (see Pet. App. 10). This view is based upon certain language in the *Foti* opinion which repeatedly noted that the order there reviewable was made in the course of a Section 242(b) proceeding to determine deportability (see, *e.g.*, 375 U.S. at 222–223, 226, 228, 229–230, 231). That language need not be regarded as dispositive of the

alien, subsequent to an order of deportation, the discretionary relief of voluntary departure and the waiver of requirements for reentry. Cf. *Kirsten-Sanders Dental Laboratory, Inc.* v. *Sahli*, 348 F. 2d 442 (C.A. 6).

[7] See *Rose* v. *Woolwine*, 344 F. 2d 993 (C.A. 4), taking a very expansive view of court of appeals' jurisdiction to review deportation proceedings.

[8] See *Tai Mui* v. *Esperdy*, *supra*; *Yamada* v. *Immigration and Naturalization Service*, No. 21,049, C.A. 9 (decided 10/17/67), where the Ninth Circuit suggested that a change in the pertinent regulations was the appropriate way to resolve the existing problem. Although the court below viewed certain decisions of the Eighth and Fifth Circuits as being to the same effect as that of the Second Circuit, neither of those courts appears to have taken a view necessarily contrary to that urged by the government here. In *Mendez* v. *Major*, 340 F. 2d 128 (C.A. 8), no deportation order was involved; what was sought was a waiver of the requirement that an alien admitted for study reside in a foreign country for two years before applying for reentry. And, while an order of deportation had been entered in *Samala* v. *Immigration and Naturalization Service*, 336 F. 2d 7 (C.A. 5), the court there treated as entirely separable from the deportation proceedings a similar application for relief from the reentry requirements. Thus, in neither case did the application for relief from reentry requirements affect an order of deportation.

question whether the scope of appeals' jurisdiction is limited to similar situations. Rather, it can and, we submit, should be read as simply reflecting the factual context there presented.

Apart from *Foti,* a consideration of the language of Section 106(a) itself discloses support for both a narrow and a broad view of court of appeals' jurisdiction to review deportation proceedings. On the one hand, the statute specifies that such judicial review relates to deportation orders made "pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act * * *" (8 U.S.C. 1105a(a)). On the other hand, the statute provides that this procedure shall be "the sole and exclusive" one for "the judicial review of all final orders of deportation * * * made against aliens in the United States * * *" (*ibid.*). Since the language can be construed either way, it is thus necessary to turn to the legislative history and to the background of the legislation to determine the congressional intent.

It seems clear that the central purpose underlying the enactment of Section 106(a) was to avoid the delays inherent in the bifurcated system of judicial review which had existed previously (see 375 U.S. at 224–226). Deportation is frequently conceded, and the bulk of judicial review presently relates to determinations involving discretionary relief. A wide variety of types of discretionary relief is now available to an alien who has been ordered deported, and many aliens seek review concurrently of determinations by both a district director and a special inquiry officer. Moreover, the same sort of relief may be

sought in different ways. For example, in *Wing Wa Lee* v. *Immigration and Naturalization Service, supra,* the alien sought the same basic relief as the petitioner in No. 637—adjustment of status as a refugee—but did so by means of a motion to reopen the deportation proceedings so as to permit the application. The refusal to grant relief on the ground that the alien was ineligible for such relief was clearly reviewable—and was reviewed—in the court of appeals, under *Giova* v. *Rosenberg, supra.* Any ruling which makes jurisdiction to review depend on the particular method by which discretionary relief is sought will inevitably result in legal jockeying for purposes of delay. Such a result would thus seem to depart, in our view, from the basic congressional purpose in enacting Section 106(a).[9]

In any event, the statutory construction question is one which plainly requires resolution by this Court.[10] In light of the existing conflict among circuits on the scope of their jurisdiction under Section 106(a) and the resulting confusion and delay in judicial review of orders of the Immigration and Naturalization Serv-

[9] We recognize that acceptance of the view that review of denials of relief affecting any alien under a deportation order lies in the courts of appeals might have the effect of increasing the docket of at least some of those courts in a significant way. That of course is a factor which should be considered in determining what Congress intended in enacting Section 106(a); we do not view it as determinative.

[10] We realize that the lack of adversity between parties might concern the Court in the instant cases. We note, however, that a similar situation existed in the *Foti* case, and there an *amicus curiae*, the Association of Immigration and Nationality Lawyers, came forward to support the position contrary to that

ice, we join petitioners in urging that this Court grant the petitions for writs of certiorari for the purpose of resolving the jurisdictional issue.[11]

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of the petitioner and the government (see 375 U.S. 217). A similar development might be expected here, should the Court grant certiorari. Alternatively, the Court might consider the possibility of appointing an *amicus curiae* to represent the view expressed by the court below (see *Granville-Smith* v. *Granville-Smith*, 349 U.S. 1, 2).

[11] Our acquiescence in certiorari should not be regarded as indicating any view on the merits of the relief sought by petitioners. Indeed, we believe that the district director properly denied the stays sought by petitioner and correctly concluded that they were ineligible for the relief sought (see *supra*, p. 2).

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